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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

ELBERT E. ROYAS,

Plaintiff and Appellant,

v.

MERCEDES-BENZ USA, INC., et al.,

Defendants and Respondents.

B166927, B169956

(Los Angeles County  
Super. Ct. No. BC223738)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Emilie H. Elias, Judge. Affirmed.

Law Offices of Herbert Hafif and Greg K. Hafif; Law Office of Robert Feinstein and Robert Feinstein; and Alan S. Yockelson for Plaintiff and Appellant.

Carroll, Burdick & McDonough, Justs N. Karsons, David M. Rice, and Laurie J. Hepler for Defendants and Respondents.

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Following trial in this personal injury action, the jury returned a verdict against plaintiff and appellant Elbert E. Royas (Royas) and in favor of defendants and respondents Mercedes-Benz USA (MBUSA) and DaimlerChrysler AG (DaimlerChrysler). Judgment was entered in respondents' favor and costs were awarded to MBUSA, partly pursuant to Code of Civil Procedure section 998.<sup>1</sup> On appeal, Royas seeks reversal and a new trial on the grounds that the trial court prejudicially excluded two pieces of evidence. He also contends that the trial court's award of costs was unreasonable. We are not persuaded, and we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Royas suffered severe burns after fluid leaked from the driving console of his 1989 Mercedes-Benz 190 E-Class. On December 14, 2000, Royas filed the instant lawsuit against respondents for negligence, fraud, strict liability, and warranty liability, alleging that the heater core in his vehicle had failed and caused his serious injuries. The case proceeded to a jury trial on January 13, 2003. Essentially, Royas posited and sought to prove that the heater core failed because of the material used -- a design defect. Respondents claimed that the heater core failed because Royas's vehicle was improperly maintained.

On February 5, 2003, the jury returned its verdict for respondents. Thereafter, MBUSA filed its memorandum of costs, seeking \$513,664. In response, Royas filed a motion to strike memorandum of costs, or in the alternative to tax costs, arguing that the bulk of the costs requested was unreasonable. After hearing argument from counsel, the trial court awarded MBUSA the reduced amount of \$215,501.97. Judgment was entered, and this timely appeal followed.

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<sup>1</sup>

All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

## DISCUSSION

### I. *Alleged Erroneous Exclusion of BASF Chart and Behr Memo*

Royas seeks a new trial on the grounds that the trial court improperly excluded two pieces of evidence: the BASF chart and the Behr memo.

#### A. Standard of Review

We review the trial court's order excluding evidence for abuse of discretion. "[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion." [Citation.] "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

“Moreover, even where evidence is improperly excluded, the error is not reversible unless “it is reasonably probable a result more favorable to the appellant would have been reached absent the error.”” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra*, 65 Cal.App.4th at pp. 1431-1432; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

#### B. BASF Chart

Royas argues that the trial court improperly excluded the BASF<sup>2</sup> chart. According to Royas, the BASF Chart “would have conclusively proven that prior to April 1991, BASF the manufacturer of the Ultramid A3WG6 resin, considered the resin not suitable in hot water and radiator fluids.”

The problem for Royas is that he never sought to introduce the BASF chart into evidence. Royas produced the BASF chart to defense counsel for the first time during trial, at the time Royas's expert was about to take the stand that morning. Consequently,

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<sup>2</sup> According to Royas's opening brief, BASF Corporation is the manufacturer of heater core end caps.

the trial court directed him to move onto another subject “until after the break,” to prevent unfair surprise and give defense counsel a chance to examine the document. (§ 128, subd. (a)(3); Evid. Code, § 320.) Despite the trial court’s directive, Royas’s counsel continued his attempt to show the jury the BASF chart.

“Q And did you see the chart that was -- that the BASF provided with it?

“MR. LYDDAN: Your Honor, objection. He’s displaying a chart.

“THE COURT: Please do not display a chart to the jury.

“MR. HAFIF: I’m not showing a chart to the jury. I’m just showing the witness a piece of paper.

“THE COURT: Put it down.

“.....

“THE COURT: Counsel, over here. [¶] Counsel, over here, please. [¶] (At the Sidebar)

“THE COURT: Don’t hold up another piece of paper in front of the jury that’s not been admitted.

“MR. HAFIF: I didn’t show it to them.

“THE COURT: You absolutely showed it to them. Don’t do it.

“MR. HAFIF: They couldn’t read it.

“THE COURT: I could read it. Don’t do it.”

The issue was then dropped.<sup>3</sup> Given that Royas never sought to admit the BASF chart into evidence, there is no exclusion ruling to review; Royas has waived this claim. (Evid. Code, § 354; *Spanfelner v. Meyer* (1942) 51 Cal.App.2d 390, 392.) Moreover, the BASF chart would have been inadmissible anyway since it is comprised exclusively of hearsay -- a purported letter and enclosures from BASF Corporation, offered by Royas for the truth of the matters asserted and subject to no exception. (Evid. Code, § 1200.)

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<sup>3</sup> At oral argument, Royas’s counsel directed us to a different page of the reporter’s transcript where he allegedly sought to introduce the BASF chart into evidence. That portion of record does not reflect what counsel stated at the hearing.

Even if the BASF chart had been improperly excluded, Royas has not established any resulting prejudice. (Evid. Code, § 354.) Royas argues that the BASF chart would have proven that the manufacturer of the resin used in the Mercedes heater core considered that resin not suitable in hot water and radiator fluids. That is exactly what Royas's expert attested at trial. Specifically, he "found that that particular resin, according to BASF, the people who produce it, is not well suited for use in hot water and in radiator fluids." Thus, the jury knew the contents of the BASF chart and still rejected Royas's claims. As such, Royas suffered no prejudice.

Throughout his opening brief (and his repetitive, at times verbatim, reply brief), Royas vaguely insinuates that respondents refused to participate in discovery. Quite simply, these off-hand comments are irrelevant. If Royas was having trouble obtaining documents during discovery, he should have made the appropriate motions in the trial court.

### C. Behr Memo

Unlike the BASF chart, the purported Behr<sup>4</sup> memo (a collective exhibit containing numerous separate writings) actually was ruled inadmissible. That ruling was correct.

According to Royas, the Behr memo would have proven that (1) the Ultramid A3WG6 resin was unsuitable for use in the Mercedes-Benz 190E heater core, (2) respondents were on sufficient notice of this to impose upon them a post-sale duty to warn, and (3) respondents had notice of an alternative design cure. This document was properly ruled inadmissible because Royas failed to offer proof that either respondent had ever seen the memo. In fact, as Royas's own expert testified, the Behr memo was prepared for BMW, MBUSA and Daimler-Chrysler's competitor. Under these circumstances, there is no reasonable basis upon which we can infer, as Royas urges, that Behr necessarily informed these respondents that Ultramid A3WG6 should not be used for heater core end caps.

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<sup>4</sup>

According to Royas's counsel, Behr was the manufacturer of the heater core.

Moreover, as set forth in the respondents' brief and unrefuted in Royas's reply brief, the Behr memo consisted of inadmissible multiple hearsay (Evid. Code, § 1200, subd. (b)), was not authenticated (Evid. Code, § 1401, subd. (a)), and Royas failed to demonstrate that the translation of this German document meets the requirements of *Correa v. Superior Court* (2002) 27 Cal.4th 444, 457.

In any event, Royas has not demonstrated any prejudice as a result of the trial court's ruling. As Royas readily concedes, his expert witness described the exhibit and its contents to the jury. Royas fails to explain why the jurors would have been more likely to find MBUSA or DaimlerChrysler liable if they had been able to consider the technical exhibit itself as opposed to just having Royas's expert testify about its significance.

Moreover, Royas's counsel argued the supposed significance of the Behr memo in his rebuttal closing. He even displayed excerpts of it and improperly told the jury that respondents "got that from their own [part] manufacturer" despite the absence of any evidence that respondents ever saw this material.

Finally, the jurors did have the document to consider for more than a day of deliberations, before its erroneous inclusion in the jury room binder was discovered and remedied. Given the fact that the jury heard the contents of the Behr memo from Royas's expert, considered Royas's counsel's argument on this point, and mistakenly had the exhibit itself available in the jury room for over a full day, Royas has not demonstrated any semblance of prejudice.

## II. *Costs Award*

### A. Standard of Review

We review the trial court's award of costs for abuse of discretion. (*Evers v. Cornelson* (1984) 163 Cal.App.3d 310, 314.)

B. The Trial Court Did Not Abuse Its Discretion in Awarding MBUSA  
\$215,501.97 in Costs

Royas contends that the trial court abused its discretion in awarding MBUSA \$215,501.97 in costs. We find no error.

Section 998, subdivision (c)(1) provides: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.”

MBUSA served a section 998 offer on Royas on February 22, 2001, and its rejection occurred by operation of law 30 days thereafter. Having prevailed at trial, pursuant to the applicable statutes, MBUSA is entitled to recover its reasonable witness fees. (§ 998, subd. (c)(1).)

Royas challenges the award on the grounds that some of the expert witness costs could be attributable solely to the defense of DaimlerChrysler, which was not a party to MBUSA’s section 998 offer. As MBUSA represented to the trial court, (1) in this complex products liability action, all the expert witness fees would necessarily have been incurred by MBUSA alone had it been the only defendant, and (2) MBUSA paid all such fees.

Furthermore, Royas’s argument notwithstanding, the trial court’s minute order awarding “costs to defendants” does not suggest that section 998 costs also were awarded to DaimlerChrysler. In light of the parties’ discussion with the trial court at the hearing on costs on July 8, 2003, it is evident that the trial court only intended MBUSA to be awarded section 998 costs. The minute order’s award of “costs to defendants” either was

a typographical error or, given that DaimlerChrysler was a “prevailing party,” the trial court was indicating its intent to award it the usual statutory costs awardable under section 1033.5.

In short, the original costs bill for this complex products liability case was \$513,664; after the hearing, MBUSA amended its request to \$245,315.35; and in the end, the trial court awarded even less. Given that Royas has not demonstrated how this reduced award was an abuse of discretion, we find no error.

### **DISPOSITION**

The judgment and order of the trial court are affirmed. Respondents are entitled to costs on appeal.

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\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
NOTT